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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Marc Mendoza – PETITIONER

vs.

Ernest De Lima, Administrator, in his capacity as Administrator, Adult Client Services Branch of the Second Circuit, State of Hawaii – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

1. May Hawaii enforce a criminal statute absent the implementing rules and regulations called for by the statute consistent with the Fifth and Fourteenth Amendments?

2. May Hawaii enforce a criminal statute absent a scienter provision consistent with the Fifth and Fourteenth Amendments?

3. May ordinary legislation nullify a state constitutional right consistent with the Fifth and Fourteenth Amendments?

4. Do unfair trial proceedings and the lack of a federal hearing violate the requirements of Townsend v. Sain, 372 US 293 (1963) and the Fifth and Fourteenth Amendments?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the courts below are unpublished. Decisions relevant to this Petition are reproduced in the Appendix.

JURISDICTION OF THIS COURT:

The Ninth Circuit has entered a decision in the present case which is in conflict with the decisions of this Court, other Circuit Courts, including its own, and the Supreme Courts of numerous states, and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

The District Court of the United States had original jurisdiction over this case under 28 USC 2254. The District Court's Modified Certificate of Appealability was entered on May 8, 2003 (App. pp. 4-6). The court of appeals judgment was entered on April 15, 2004 . Petitioner's timely Petition for Rehearing was denied by the Ninth Circuit on July 13, 2004 . This Court has jurisdiction to review this case under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE:

United States Constitution, Article IV, Sect. 4 states in relevant part:

> "The United States shall guarantee to every State in this Union a Republican Form of Government ..."

United States Constitution, Article VI, cl. 2 states in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof

... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Second Amendment:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Hawaii Constitution, Article 1, sec. 17:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Hawaii Administrative Procedures Act (HAPA) @ HRS 91-1(1):

> ""Agency" means each state or county...department or officer authorized to make rules or to adjudicate contested cases...

Hawaii Revised Statutes (HRS) HAPA 91-1,-2(4)(b):

> No agency rule, order, or opinion shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been published or made available for public inspection as herein required...

Hawaii Administrative Procedures Act (HAPA) @ HRS 91-1(4):

> "Rule" means each agency statement of general or particular applicability and future effect that implements, interprets or prescribes law or policy...

Hawaii Revised Statutes (HRS) 121-1:

> 121-1 Militia. The militia of the State shall consist of EVERY resident able-bodied citizen of the United States who is seventeen years old or older and under forty-six years of age and all other able-bodied residents of that age who have declared their intention to become citizens of the United States. The militia shall be composed of four classes: (Emphasis added)

1. The federally organized and recognized national guard,
2. The remainder of the organized militia to be known as the Hawaii state guard,
3. The naval militia,

4. The unorganized militia.
   The unorganized militia shall consist of those members of the militia who are not members of the national guard, the naval militia, or the state guard. The unorganized militia shall be subject to active military duty only when called or ordered into the service of the State for such period as is required. They may be assigned to existing organizations of the Hawaii national guard, the naval militia, or the state guard, or otherwise as the exigencies require. [L 1967, c. 196, pt of 1; HRS 121-1, am L 1969, c 15, 1(a)] (Emphasis added)

Hawaii Revised Statutes (HRS) 134-6(d), (e) :

...place to keep firearms; loaded firearms, penalty.

(d) It shall be unlawful for any person on any public highway to carry on the person, or to have in the person's possession, or to carry in a vehicle any firearm loaded with ammunition; provided that the subsection shall not apply to any person who has in the person's possession or carries a pistol or revolver and ammunition therefore in accordance with a license issued as provided in section 134-9.

Any person violating subsection (a) or (b) shall be guilty of a class A felony. Any person violating this section by carrying or possessing a loaded firearm or by carrying or possessing a loaded or unloaded pistol or revolver without a license issued as provided in section 134-9 shall be guilty of a class B felony. Any person violating this section by carrying or possessing an unloaded firearm, other than pistol or revolver, shall be guilty of a class C felony

Hawaii Revised Statutes (HRS) 134-9:

Licenses to carry. (a) In an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the chief of police of the appropriate county may grant a license to an applicant who is a citizen of the United States of the age of twenty years or more or to a duly accredited official representative of a foreign nation of the age of twenty years or more to carry a pistol or revolver and ammunition therefore concealed on the person within the county where the license is granted. Where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral character who is a citizen of the United States of the age of twenty years or more, is engaged in the protection of life and property, and is not prohibited under section 134-7 from the ownership or possession of a firearm, a license to carry a pistol or revolver and ammunition therefore unconcealed on the person within the county where the license is granted. Unless renewed, the license shall expire one year from the date of issue. (Emphasis add.)

(b) The chief of police of each county shall adopt procedures to require that any person granted a license to carry a concealed weapon on the person shall: (Emphasis added)

(1) Be qualified to use the firearm in a safe manner:

(2) Appear to be a suitable person to be so licensed:

(3) Not be prohibited under section 134-7 from the ownership or possession of a firearm: and

(4) Not have been adjudged insane or not appear to be mentally deranged.

(c) No person shall carry concealed or unconcealed on the person a pistol or revolver

without being licensed to do so under this section or in compliance with section 134-6. (Emphasis added)

(d) A fee of $10 shall be charged for each license and shall be deposited in the treasury of the county in which the license is granted.

I. STATEMENT:

A. Implementing Rules And Regulations Are Essential For Valid Enforcement Of A Criminal Statute.

The instant case was mounted after two years of investigation dating from 1993 under Hawaii's Freedom of Information Act into Hawaii's obedience to the Hawaii Administrative Procedures Act (HAPA) and the plain language of HRS 134. (ER @ 74-77; 95-97; 212; 263) Petitioner eventually documented that Hawaii's state and local regulatory agencies had failed to lawfully implement HRS 134 and were operating without written guidelines or lawful forms as required by statute.

Despite admissions by state and local regulatory agencies of failure to promulgate or implement the regulatory statutes herein complained of, elementary state and federal principles have been ignored in the present case without explanation or "adequate and independent" state grounds. (ER @ 212;)

At the time of Hawaii's inclusion as the fiftieth state, the principals of administrative law had only a short history (Wong Yang Sung vs. McGrath, 339 U.S. 33 @ 36-41 (1950)). At the present, however, administrative law is no longer a novelty; both this court and the Supreme Court of Hawaii have amassed a substantial body of law detailing the general parameters which govern administrative agencies. (CR 1, 30, etc.)

The Hawaii Supreme Court, referred to repeatedly in Corpus Juris Secundum's Administrative Law section, has produced a significant body of case law specifically regarding the necessity of written, objective administrative rules and regulations.[1]

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[1] Aguiar v. HHA, 522 P2d 1255 @ 1264: Rules not adopted in compliance w/statutory rule-making procedures, "by the fact of that failure alone have no "force or effect."" (rent increases by the Hawaii Housing Authority adopted without conformity to the HAPA); Ainoa v. Unemployment Compensation Appeals Div., 614

Crucial to the basic principles of administrative law are the limits imposed by the Fifth and Fourteenth Amendments on agency action, and the bedrock principal that administrative rules and agency action may not operate to nullify Constitutional rights (Administrative Procedures Act (APA), 5 U.S.C. 551-559, 701-706, accord HRS 91(HAPA); 2 AmJur 2d Administrative Law 228).

In the criminal context, the duty of administrative agencies to produce written, objective standards is increased by the severity of the penalties involved. (Lilly v. Grand T.W.R. Co., 317 U.S. 481 @ 488-89 (1943), U.S. v. Morton Salt Co., 338 U.S. 632 @ 644 (1950); c.f.

P2d 380 @ 381-83: state agency must conform to requirements of state's administrative procedure act (unemployment insurance benefits); Town v. Land Use Comm., 524 P2d 84: "All state and county ... departments or offices must conform to requirements of [HAPA]" (Maui land dispute), and U.S. v. County of Hawaii, 473 F.Supp. 261 appear in the Administrative Procedure section of 73 CJS, pp. 359, 360, 361, 580, 600, 635, and 656.

CJS repeatedly refers to Aguiar and other Hawaii Supreme Court decisions to illustrate the necessity of written rules and regulations, including Aluli v. Lewin, 828 P2d 802 (1992) (importance of written rules); Application of Hawaiian Electric Co., Inc., 918 P2d 561 (1996) (court discussed Aluli and contrasted rule-making and adjudication); Barabin v. AIG Hawaii Ins. Co., Inc., 921 P2d 732 @ 735-6 (1996); Aged Hawaiians v. Hawaiian Homes Comm., 891 P2d 279 @ 298-299 (discussing the necessity of a "property interest" in a successful due process claim). Property right/interest in an administrative agency setting is also discussed in: Bush v. Hawaiian Homes Comm., 870 P2d 1272 @ 1279- 80, 1281 (1994); Kernan v. Tanaka, 856 P2d 1207 @ 1218-22 (1993), (discussing "the Aguiar analysis"/due process/property interests of a valid claim), and Hawaii Gov't Emp. Ass'n. v. Comp. App. Bd., 861 P2d 747 @ 753 (1993), (primarily dealing with the right to a hearing). See also: Silver v. Castle Memorial Hospital, 497 P2d 564 (1972)(procedural due process requirements must not be arbitrary, capricious or unreasonable); State v. Lee, 465 P2d 573 @ 577 (1970): (Regulations [must] give warning sufficient to satisfy due process); In re Western Motor Tariff Bureau, Inc., 486 P2d 413 @ 416((1971): "The powers and resources of government should not be used in a manner giving an appearance of being arbitrary and capricious."

Nguyen v. U.S., 824 F2d 697 (9th Cir. 1987), 5 U.S.C. 551, 2 AmJur 2d Administrative Law 238-9)

Similarly elemental to valid enforcement of a regulatory statute carrying criminal penalties is the necessity of a scienter provision which is absent in HRS 134-6 and –9 (Morissette v. United States, 342 U.S. 246 @ 275 (1952), Vlandis v. Kline, 412 U.S. 441 @ 446 (1973) and Sandstrom v. Montana, 442 U.S. 510 @ 526 (1979)).

> "As we have observed, "[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." ... the potentially harsh penalty attached to violation of [the statute]- up to 10 years' imprisonment- confirms our reading of the Act. Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea." Staples v. United States, 114 S.Ct. 1793, 1797, 1801 f.n. 6, 1802 (1994) Emphasis added.

Despite the documented lack of standards, harsh penalties, and the lack of a scienter provision, the courts below have failed to apply the rule of 'strict construction' in reviewing this case:

> "In the context of criminal prosecution, we must apply the rule of strict construction when interpreting this regulation and statute. [Internal cites omitted]....In the framework of criminal prosecution, unclarity alone is enough to resolve the doubts in favor of defendants." – U.S. v. Mersky, 361 U.S. 431 @440-441 (1959).

In U.S. v. Erickson, 75 F3d 470 @ 475 (1996), the Ninth Circuit held that penal regulations not only must define the prohibited behavior, but must be drawn "in a manner which does not encourage arbitrary and discriminatory enforcement", citing U.S. v. Stansell, 847 F.2d 609 @ 615 (9th Cir. 1988) and U.S. v. Talbot, 51 F.3d 183 @ 188 (9th Cir. 1995).

The present ruling departs from that clear standard.

Without written rules or regulations, no Citizen is actually able to ascertain whether or not he qualifies to claim Hawaii's presently usurped Constitutional right. (ER @ 97)

"[W]here .... there are no standards governing the exercise of discretion granted.....the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." -Papachristou v. City of Jacksonville, 405 U.S. 156 @ 170 (1972).

Hawaii and Respondent have further failed to apply the "compelling state interest" test to Hawaii's gun-owning "suspect class" as required under Hawaii's Constitution and state and federal law[2]. In the face of legislation so sweeping, "The law must be shown "necessary, and not merely rationally related to, the accomplishment of a permissible state policy." (Griswold v. Connecticut, infra, @ 497, internal cites omitted.)

The instant case starkly illustrates how the abandonment of the basic principles of administrative law foster agency abuse and have operated in Hawaii to nullify an enumerated right with ancient and honorable Anglo-American roots. (ER @ 285-294: 97th Congress, 2nd Session: The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate. Hereinafter: ER/Senate Report)

The present case further illustrates that the lack of a federal hearing has operated to the prejudice of Petitioner and necessitated this Petition. (Townsend v. Sain, 372 U.S. 293 @ 313-19 (1963) as modified by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

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[2] e.g.: Baehr v. Lewin, 74 Hawaii 530 @ 571-580 (1993); Plyler v. Doe, 102 S.Ct. 2382, 2395 (1982); Griswold v. Connecticut, 381 U.S. 479 @ 497-498 (1965).

B. Enforcement Of An Unimplemented Statute Clearly Violates This Court's 'Arbitrary And Capricious' Standard.

Administrative agencies operating without written rules and regulations violate this court's "arbitrary and capricious" standard under United States v. Morton Salt Co., 338 U.S. 632 @ 644 (1950), Chrysler Corp. v. Brown, 441 U.S. 281 @ 308 (1979) and Marsh v. Oregon Natural Resources Council, 490 U.S. 360 @ 375-76 n. 21 (1989), as well as the fundamental principles of the APA (5 U.S.C. 706(2)(A)), the model for HAPA.

Administrative agencies are required by both state and federal law to promulgate written rules and regulations in order to lawfully exercise their regulatory powers. (Chrysler Corp. v. Brown, 441 U.S. 281 @ 302-304 (1979)[3]; United States v. Mersky, 361 U.S. 431 @ 437-38, 463 (1960)[4].

Police departments in Hawaii, as rule-making agencies, are specifically required to conform to the rule-making requirements of HAPA (In re Doe, 9 Haw. App. 406, 844 P.2d 679 (1992)). Even Blackstone acknowledged the obligation of written standards as fundamental to valid enforcement of the law[5].

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[3] "In order for a regulation to have the "force and effect of law," it must have certain substantive characteristics and be the product of certain procedural requisites ...For agency discretion is limited...also by the procedural requirements which "ASSURE FAIRNESS AND MATURE CONSIDERATION OF RULES OF GENERAL APPLICATION."(Internal quotes omitted.) Emph.add.

[4] "Once promulgated, the regulations, called for by the statute itself, have the force of law and violations thereof incur criminal prosecutions, just as if all the details had been incorporated into the Congressional language. The result is that NEITHER THE THE STATUTE NOR THE REGULATIONS ARE COMPLETE WITHOUT THE OTHER, AND ONLY TOGETHER DO THEY HAVE ANY FORCE." Emphasis added.

[5] 1 Blackstone 45: Of the Nature of Laws sec. 46: "It is likewise "a rule prescribed." Because a bare resolution, confined in the breast of the legislator without properly manifesting itself by some ex-

On its face, the failure of Maui's police chief to establish written standards constitutes an arbitrary abuse of his office and renders HRS 134-6 and -9 unenforceable in the present case[6]. As recognized throughout the Ninth Circuit, "Unwritten standards and policies are no better than no standards and policies at all" (Sun Ray Drive-In Dairy v. Oregon Liquor Control Commission, 517 P2d 289 @ 293 (1973)).

Nevertheless, after two years of evasion, both Hawaii's state Attorney General and Maui's police chief were eventually compelled by an outside agency to admit their failure to fulfil their duties under HRS 134 and HAPA. (ER @ 95-97,212,etc.; Appendix !)

Petitioner's peaceful act was the simple "claim and exercise" of a Constitutional right, an innocent act which may not be criminalized by a mere statute[7]. Peacefully 'bearing arms' for the defense of oneself or others is an act recognized as historically lawful by the U.S. Senate and a majority of the states (ER/Senate Report @ 293: Conclusion).

Petitioner's charges do not reflect, and no witness alleged at trial, that Petitioner had abused the right presently recognized and regulated in thirty-five states[8]. Petitioner's charges and the record do not al-

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ternal sign, can never properly be a law. It is requisite that this resolution be notified to the people who are to obey it."

[6] Administrative rules not promulgated in accordance with HAPA are invalid and unenforceable: Burk v. Sunn, 68 Hawaii 80, 705 P.2d 17 (1985).

[7] Miranda v. Arizona, 384 U.S. 436 @491.: "Where rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them."

[8] Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

lege or reflect any threat of harm or actual damage to any party, or any act "in terrorem populi". (ER @ 246)

Petitioner's only act in 1995 was the 'violation' of an unimplemented statute which creates a non-rebuttable presumption of guilt regardless of intent[9]; effectively nullifies twin Constitutional 'guarantees'; and which remains unimplemented to this day.

To Petitioner's prejudice, the "totality of circumstances," including Hawaii's dearth of tradition or caselaw regarding the right to bear arms, Petitioner's counsel's complete lack of preparation for trial (ER @ 110-123), and the lack of a federal hearing have each contributed to a series of false conclusions and incriminating presumptions unsupported by the facts and history of Petitioner's intent, conduct and research.

More importantly, his conviction demonstrates an ongoing abuse of power which cannot stand under the Supremacy Clause or the Fifth and Fourteenth Amendments. The enumerated state rights to due process and equal protection (Hawaii Constitution @ Article I sec. 5 and 8), property[10] (Article I sec. 2), privacy (Article I sec. 6), arms (Article 1 sec. 17), and reserved rights (Article I sec. 22), indicate liberty interests which conspire against Hawaii's absolute denial of the rights herein asserted and require federal due process protection[11].

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[9] e.g.: Cheek v. United States, 498 U.S. 192 (1991): "Bishop and Pomponio conclusively establish that the standard for the statutory willfulness requirement is the "voluntary, intentional violation of a known legal duty."" Schware v. Board of Bar Examiners, 353 U.S. 232 @ 246 (1950): "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." (Accord Wieman v. Updegraff, 344 U.S. 183 @ 191 (1952)).

[10] ER @ 99:Transcript, Motion to Dismiss, June 13, 1996: DEFENDANT:"I either have [a] property right in my property or I don't. Property is that pure and dispotic [sic] dominion which an individual exercises over the external things of the world to the exclusion of every other individual in the universe."c.f.2 Blackstone1@ 2

[11]ER @ 106-7:Transcript, Motion to Dismiss, June 13, 1996:

C. Constitutional Provisions, By Definition, Are Superior To Ordinary Legislation.

The Ninth Circuit's holding tacitly assumes that the legislative powers of the state of Hawaii are not limited by the very Constitution from which its powers and existence are derived. The legislature of Hawaii, however, is constrained by the plain language of Hawaii's Constitutional arms guarantee at Article 1, sec. 17, as well as the due process requirements of the Fifth and Fourteenth Amendments.

If it is arguable in the Ninth Circuit whether the Second Amendment may be asserted by an individual[12], identical language in the state Constitution makes the right in Hawaii inevitable, whether as a residual element of citizen sovereignty[13]; a property interest[14]; or

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DEFENDANT: "I see. So in other words, your Honor, the due process failures, failure to promulgate, failure of the chief to adopt written procedures, failure of any of the so-called officers to actually be officer[s] de jure, all those things don't matter. Is that your position?"

COURT: "I don't think they matter as regards the charges against you." (c.f. ER @ 109)

[12]"I join the court's opinion, and write to elaborate that Hickman v. Block, 81 F.3d 98 (9th Cir. 1996), was wrongly decided, that the remarks in Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002), about the "collective rights" theory of the Second Amendment are not persuasive, and that we would be better advised to embrace an "individual rights" view of the Second Amendment, as was adopted by the Fifth Circuit in United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001), consistent with United States v. Miller, 307 U.S. 174(1939). We should recognize that individual citizens have a right to keep and bear arms, subject to reasonable restriction by the government."-Judge Gould, concurring opinion, Nordyke v. King, 99-17551 @ 2228-2238 (9th Cir., 2003))

[13] c.f.1 Blackstone 1, sec. 199-200; 3 Story ch. IV, sec. 395; ch. XLIV sec. 1890, accord U.S. v. Cruikshank, 92 U.S. 542 @ 552 (1875

[14] "[T]his right of [] citizens to bear arms for their own self-defense and for the defense of the state is an interest in both liberty and property ... protected by the Fourteenth Amendment ... This in-

an attribute of federal power[15]. (c.f. California Supreme Court Justice Brown's analysis in Kasler v. Lockyer, 23 Cal.4th 472 @ 505-6, 510 (2000).

The District Court acknowledged that the state and federal right to "bear arms" is never granted under any circumstances in Maui county (ER @ 15-16). The court further held that Maui's chief of police need not adopt written procedures until he decides to grant some undefined citizen a license (ER @ 15-16). Those holdings render moot an enumerated right which cannot be arbitrarily denied without a Constitutional due process and equal protection conflict.

Contrary to the District Court's holding, a "licensing scheme that grant[s] unbridled discretion to public officials", gave Petitioner clear standing "to challenge the scheme on its face, without first applying for a permit" under U.S. v. Linick, 195 F3d 538 @ 541 (9th Cir. 1999) and Shuttlesworth v. Birmingham, 394 U.S. 147 @ 151 (1969).

The Ninth Circuit, however, held that Petitioner lacked standing to claim or exercise the right despite the District Court's finding that the "right" cum privilege is neither granted to private citizens, nor governed by objective rules (ER @ 15-16; App. @ 8). The distinction between rights and privileges, though, is fundamental. In Hawaii, "bearing arms" is an enumerated right, not an administrative privilege; by definition Hawaii Citizens do not require an "exceptional case" in order to exercise their Constitutional rights. (c.f. HRS 134-9(a); ER @ 77-78; 100; 103; 186-192; 213-14, etc.)

Even in California, Petitioner's state-in-exile[16], which has no state arms guarantee, an administrative

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terest is one of liberty ... There is also a property interest ..." Kellogg v. City of Gary, 562 N.E.2d 685, 694 (Ind. 1990))

[15] Presser v. Illinois, 116 U.S. 252 @ 265 (1886) c.f. J. Story, Houston v. Moore, 1 S.Ct. 19 @ 31 (1820).

[16] Petitioner's punishment included court-ordered banishment from Hawaii. (ER @ 59)

officer with a policy of denying all concealed carry licenses may be compelled to issue them by mandamus: Erdelyi v. O'Brien, 680 F.2d 61 @ 64(1982), citing Salute v. Pitchess, 61 Cal.App. 3d 557, 132 Cal.Rptr. 345 (1976).

> "To determine, in advance, as a uniform rule, that only selected public officials can show good cause [to carry a concealed weapon] is to refuse to consider the existence of good cause on the part of citizens generally and is an abuse of, and not an exercise of, discretion."

The Ninth Circuit not only misreads HRS 134-6 and 9, but misapplies the concept of a written constitution and the agency duty of implementing regulations. The court additionally shifts the burden of proof from Respondent to Petitioner).

No allegation was ever made at trial that Petitioner- a Maui magazine writer who routinely carried large amounts of cash, a long time rifle and pistol competitor, a Citizen of the United States and a sixteen year resident of Hawaii- was a person facially unqualified to bear arms under Hawaii's guarantee or the undefined guidelines of HRS 134 6 and –9. (e.g. CR 56 @ 4-8)

The Constitutional onus is upon Hawaii to establish objective standards which regulate the right to bear arms as have more than thirty other states.

II. REASONS FOR GRANTING THE PETITION, VACATING PETITIONER'S CONVICTION, OR REMANDING THIS CASE TO THE APPROPRIATE LOWER COURT FOR FURTHER PROCEEDINGS:

A. The Ninth Circuit's Decision Is In Conflict With The Supreme Courts Of Numerous States:

The instant case relies primarily upon the administrative and procedural due process requirements regarding Hawaii's 'regulation' of the state and federal Constitutional right to bear arms, and the imperative

duty of government to fair and objective procedures in that regulation. The question of the state or federal right to arms, while discussed, is less the issue in this case than are Hawaii's due process failures in the 'regulation' of that right. (ER @ 95-97; 229-30, etc.)

While in some respects tangential to that discussion, however, an examination of the history, purpose and meaning of the right to bear arms is necessary to dispel the Ninth Circuit's apparent perception that Petitioner's 'claim and exercise' of the right to bear arms was intrinsically suspect or overtly criminal, and its judicially created mythology that the Second Amendment's recognition of the right to bear arms does not apply to individual citizens, a conclusion which flies in the face of the language of the guarantee, the dicta of this court, the position of the U.S. Justice Department[17], the plain jurisprudence of the Fifth Circuit, and the conclusions of the U.S. Senate as well as every major commentator of the last two centuries (ER p. 10; ER/Senate Report; U.S. v. Emerson, 270 F.3d 203 (5th Cir. 2001)). c.f. Halbrook, Firearms Law Deskbook, (1995) ch. 1 sec. 2 for an analysis of the varying opinions of the U.S. Circuit Courts regarding the right.)

Given the identical language of both guarantees, at trial and on appeal Petitioner has referred to the U.S. Senate's clearest Second Amendment pronouncement to shed light on the inevitable meaning of Hawaii's state arms guarantee, and to buttress his arguments regarding the role of federal agents in this case. (ER @ 80-81; ER/Senate Report @ 285-294)

It bears noting that, with the exception of Hawaii, every state within the Ninth Circuit's jurisdiction allows and regulates the right of individual citizens to

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[17]Solicitor General Olson, May 6, 2002: "The current position of the United States, however, is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms...."

bear arms, including California which has no state arms guarantee (see f.n. 8).

On its face, HRS 134-6 and –9(c) do not allow open OR concealed carry of a firearm without a license which is never granted, facially infringing the liberty and property rights of Petitioner and the citizens of Hawaii without due process. (ER @ 230; 237-38)

Numerous jurisdictions nationwide have held similarly overbroad statutes violate the rights of their citizens.

State courts in Alabama[18], Colorado[19], Idaho[20], Indiana[21], and West Virginia[22] have struck down pro-

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[18] "A statute which, under the pretence of regulating, amounts to a destruction of the right ... would be clearly unconstitutional." Hyde v. City of Birmingham, 392 So. 2d 1226, 1227, 1228 (Ala. Cr. App. 1980), quoting State v. Reid, 1 Ala. 612 (1840).

[19] Lakewood v. Pillow, 180 Colo. 20, 501 P. 2d 744, 745 (1972): "A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. ... Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when that end can be more narrowly achieved." (Emph. add.)

[20] In Re Brickey, 70 P. 609, 101 Am. St. Rep. 215, 216 (1902): "A statute prohibiting the carrying of concealed deadly weapons would be a proper exercise of the police power of the state. But the statute in question does not prohibit the carrying of weapons concealed ... but prohibits the carrying of them in any manner in cities, towns and villages. We are compelled to hold this statute void." (Emph. add.)

[21] Schubert v. De Bard, 398 N.E. 2d 1339, 1341 (Ind. App. 1980): "Such an approach contravenes the essential nature of the constitutional guarantee. It would supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual citizen is involved." Emph. add.

[22] State ex rel City of Princeton v. Buckner, 377 S.E. 2d 139, 146 (1988): "We stress, however, that the legitimate governmental purpose in regulating the right to bear arms cannot be pursued by

hibitory statutes which rendered the right to arms indistinguishable from an administrative privilege. In at least twenty-one recorded cases, state statutes or local ordinances have been held to violate constitutional guarantees of the right to keep arms or to bear arms.[23] (c.f. Halbrook, supra, ch. 1.4 (1995))

Both the Second Amendment and Hawaii's Article 1, sec. 17 also include an express provision regarding a "free state," a condition which Petitioner argues has been plainly denied both he and the people of Hawaii, transforming this case from one with merely local significance to one necessary to the development of national law.

"Free" has historic meaning and significance in this case, not as an abstract concept, but as an enumerated element of twin Constitutional guarantees:

> " Free: 2. In government, not enslaved; not in a state of vassalage or dependence, subject only to fixed laws, and to a regular administration of such laws; not subject to the arbitrary will of a sovereign or lord; as a free state, nation or people. 3. ...securing private rights and privileges by fixed laws and principles; not arbitrary ... as a free constitution or government. 16. Invested with franchises; enjoying certain immunities...17. Possessing without vassalage or slavish conditions...18. Liberated from the government ..." Noah Webster's First Edition of an American

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means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved." (Emph. add.)

[23] Barnett v. State, 695 P.2d 991 (Or., 1985); State v. Delgado, 692 P.2d 610 (Or., 1984); State v. Blocker, 630 P.2d 824 (Or., 1981); State v. Kessler, 614 P.2d 94 (Or., 1980); Junction City v. Mevis, 601 P.2d 1145 (Kan., 1979); City of Las Vegas v. Moberg, 485 P.2d 737 (N.M., 1971); People v. Nakamura, 62 P.2d 246 (Colo., 1936); State v. Kerner, 107 S.E. 222 (N.C., 1921); State v. Rosenthal, 55 A. 610 (Vt., 1903); Glasscock v. City of Chattenooga, 11 S.W. 2d 678 (Tenn., 1928); People v. Zerillo, 189 N.W. 927 (Mich., 1922); State v. McAdams, 714 P.2d 1236 (Wyoming) etc.

Dictionary of the English Language (1828), emphasis added.

"State" as used in the Constitution means several things; it is the people of a particular area; it is the physical area defined as a state; and it is the government and its institutions[24]. Petitioner contends, in agreement with a majority of legal commentators and the United States Senate[25] that it is "the people" of the United States, the ultimate heirs of the Constitution, who are protected by the guarantee of the fundamental right to arms[26], unlike the vulnerable, unarmed and chronically butchered or enslaved peoples of Asia, Africa and Europe[27]. In the context of Hawaii's 'guarantee,' identical language renders that conclusion inevitable.

The Senate has overtly confirmed an individual right to arms on several occasions.[28] This Court has similarly implied an individual right to arms in a variety of cases; inter alia, this Court has held that:

> "The Second Amendment protects "the right of the people to keep and bear arms"; and that "the people" protected by the ... Second Amendment ... refers to a class of persons who are part of a national community or who have otherwise de-

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[24] Texas v. White, 74 U.S. 227@ 236 (1868); c.f. Republican Form of Government, 120 L.Ed. 2d 957 @ 964, 965.

[25] ER/Senate Report, supra.

[26] ""The people" seems to have been a term of art employed in select parts of the Constitution....The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." U.S. v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990). Emphasis added.

[27] The Federalist #46, Encyclopedia Brittanica Great Books, vol. 40, 152-153.

[28] i.e.: Public Law No. 274, 77th Cong., 1st session, Ch. 445, 55 Stat., pt. 1, 742 (October 16, 1941); "The Right To Keep And Bear Arms: Report Of The Subcommittee On The Constitution," Senate Judiciary Committee, 97th Congress, 2d sess., at 12 (1982); Pub. Law No. 99-308, 100 Stat. 449, sec. 1(b) (May 19, 1986).

veloped sufficient connection with this country to be considered part of that community."- U.S. v. Verdugo-Urquidez, 494 U.S. 259 @ 265,110 S.Ct. 1056 @ 1060-61 (1990).

This Court has further held that:

"[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution ... [such as] ... *the right to keep and bear arms* ... It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints ...."- Planned Parenthood v. Casey, 505 U.S. 833 @ 841(1992)). Emphasis added.

This Court has further recognized firearms ownership as a commonplace and historic right of the American people (Staples v. United States, 511 U.S. 600 @ 601, 610-14 (1994))[29].

Cases cited in U.S. v. Miller, 307 U.S.174 @ 182 recognize a specific class of pistol historically similar to Petitioner's as long protected by the right to bear arms[30]. (ER @ 45; 190-192; 216; CR 30, etc.)

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[29]"In contrast to the selling of dangerous drugs...or the possession of hand grenades..., private ownership of guns in this country has enjoyed a long tradition of being entirely lawful conduct. Here, the Government essentially suggests that we should interpret the section under the altogether different assumption that 'one would hardly be surprised to learn that owning a gun is not an innocent act.' That proposition is simply not supported by common experience. Guns in general are not 'deleterious devices or products or obnoxious waste materials.' As suggested above, despite their potential for harm, guns generally can be owned in perfect innocence...[and] traditionally have been widely accepted as lawful possessions." Emphasis added.

[30] "...needful to, and ordinarily used by a well regulated militia...to enable them to resist oppression, prevent usurpation, repel invasion, etc."; "a customary part of the equipment of a militiaman...On the other hand, some courts...have extended the protection to weapons of all descriptions"; "such arms as are commonly

The Supreme Court of Hawaii similarly recognizes an undefined class of firearms, necessarily including pistols, as protected under Miller in State v. Mendoza, 920 P.2d 357 (1996) f.n. 4[31]

The logic of the above decisions may be linked to U.S. v. Cruikshank, 92 U.S. 542 @ 552 (1875), which recognized that the right to "bear arms" for a lawful purpose is not granted by or dependant upon the Second Amendment for its existence, but is rather a preexisting right derived from time immemorial.

In that respect only, the Ninth Circuit's conclusion in Hickman v. Block, 81 F.3d 98 (9th Cir. 1996) - that the Second Amendment does not grant an individual right to keep and bear arms – is correct.

B The Ninth Circuit's Ruling Fails To Distinguish Between Criminal And Historically Protected Behavior:

Petitioner argued at trial that, far from a criminal act, the right to the tools of self-defense is an intrinsic

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kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State"; "...it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,- arms to be used in defending the state and civil liberty".

Insofar as the "reasonable relationship to the preservation or efficiency of a well regulated militia" requirement of Miller is concerned, this arm has been in constant use by the armed forces and the people of the United States since 1911. For almost a century it has been the most popular competition and self defense pistol in the U.S.; no court has ruled on the question of the protected status of Petitioner's firearm.

[31]"However, we are without power to overrule the Court's long-standing interpretation of the Second Amendment. As recently as sixteen years ago, the Court cited Miller, supra, for the proposition that "the Second Amendment guarantees no right to keep and bear a firearm that does not have some reasonable relationship to the preservation or efficiency of a well regulated militia." Lewis v. United States, 445 U.S. 55, 65-66 n.8 (1980)" .

part of the American common law heritage[32]. (ER @ 170-177; 188-192; 213-14, etc.)

Petitioner does not argue herein to vindicate per se a right to arms which has existed independent of government from time immemorial, but that that right, enumerated in the Hawaii and U.S. Constitutions, must be allowed and regulated within historic limits and in a lawful manner. In that context, Petitioner reiterates the fact that in the course of this litigation, Petitioner has never been charged with criminal intent, nor harm or threat to another. (ER @ 268-277)

Anglo-American jurisprudence has long recognized the right to life is man's fundamental right[33]. It follows therefore, that American citizens possess an assertable, definable, recognizable right to arms and self defense inevitably secured within the penumbras of both federal and state privacy, arms and reserved rights guarantees and protected under the due process clauses of the Fifth and Fourteenth Amendments[34].

The U.S. Senate , in the Firearm Owners Protection Act, specifically linked the right to "keep and bear arms" to the Fourth, Fifth, Ninth and Tenth Amendments[35].

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[32] See Hamburger, "Natural Rights, Natural Law And American Constitutions," 102 Yale L.J. 907 (1993).

[33] "The right of self-defense is the first law of nature.... Wherever...the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction."- Tucker, 1 Blackstone's Commentaries 300 (1803) Emph. add. (ER @ 135-38; 277)

[34] U.S. v. Gomez, 81 F3d 846, 850 n. 7 (9th Cir. 1996):"The Second Amendment embodies the right to defend oneself ...against physical attack." C.f. Kellogg v. City of Gary, 562 N.E.2d 685, 694 (Ind. 1990), supra.

[35] Public Law 99-308, 100 Stat 449, 18 USC 921 (b): (The Firearm Owners Protection Act), which says in relevant part:

> "The Congress finds that*** the rights of citizens ***to keep and bear arms under the Second Amendment to the [U. S.] Constitution;*** to security against unreasonable searches and seizures under the fourth Amendment; and

Arguably, the watershed moment for the political right of self defense came in 1215 when the English Barons asserted the collective right of the people to protection from the crown by forcing King John to sign the Magna Carta. (c.f. 1 Blackstone 1 sec. 172)

One of the next watersheds came in 1625 with Grotius[36] and the first attempt to define the Law of Nations, a body of law drawn from direct analogy to the rights of individuals. When John Locke wrote his Second Treatise of Civil Government in 1690, therefore, he referred to Grotius as authority, arguing as a given that an individual acting with violent, unlawful intent could be resisted as a matter of right[37].

Building on Grotius' foundation, in 1673 Samuel Pufendorf ushered in a new era when he published On The Duty of Man and Citizen, wherein, inter alia, he refined the sovereign's - in America, the people's - absolute necessity of self defense[38].

Emerich Vattel broke new ground with The Law of Nations in 1758[39] . Recognized as an authority by

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uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth Amendment; and unconstitutional exercise of authority under the ninth and tenth Amendments;
Require additional legislation to correct existing firearms statutes and enforcement policies" Emphasis added.

[36] Of the Law of War and Peace.

[37] Ch. II: Of the State of Nature; III: Of the State of War; VII: Of Political or Civil Society; XVII Of Usurpation; XIX: Of the Dissolution of Government.

[38] Ch. V:On the Duty of Man toward Himself (Cambridge Ed. 1682)

[39] Vattel, ch. 2: " The right of self-preservation carries with it the right to do whatever is necessary for that purpose, for the natural law gives us the right to all those things without which we cannot satisfy our obligations; otherwise it would oblige us to do what is impossible, or rather it would contradict itself, by prescribing a duty and at the same time refusing us the sole means of fulfilling it." c.f. Book III, Ch. I: War...and the Right of Making War. Emphasis added.

Blackstone, Kent and this Court, Vattel emphasized the "perfect right" of self defense[40].

By 1765, Blackstone related the "absolute right" to arms with both individual and collective self defense[41], and described arms borne by an individual as "absolute property."[42] By the time of the framers, so accepted was the belief in an individual right to self defense, that both the first edition of the Encyclopedia Britannica in 1771[43] and Webster's First American Dictionary of the English Language in 1828[44] contained specific references to the right.

In 1776, the Declaration of Independence typified a belief in the collective right of self-defense,[45] a concept endorsed by Alexander Hamilton in the Federalist Papers No. 28 [46].

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[40] See generally: "Beyond Penumbras and Emanations: Fundamental Rights, The Spirit Of The Revolution, And The Ninth Amendment," sec. IV: Textual Repository of Natural Rights, 5 Constitutional Law Journal 435 @ 465 et seq. (1995).

[41] Chapter 1: Of the Absolute Rights of Individuals (1 Blackstone 143-4: 199)

[42] Chapter 25: Of Property in Things Personal (2 Blackstone 389).

[43] Encyclopedia Brittanica, First Edition, 1771: "Law: Law may be defined ...It is divided into the law of nature, the law of nations, and civil... law. ...1. The law of nature is that which God has prescribed to all men...and comprehends all the duties we owe either to the Supreme Being, to ourselves, or to our neighbor; as reverence to God, SELF-DEFENSE...etc. The law of nature, where it either commands or forbids, is immutable...2. The law of nations is...similar to the duties arising between individuals...so what is the law of nature when applied to men...is indeed the law of nations when applied to kingdoms or states." Emphasis added.

[44] Webster's American Dictionary of the English Language, (1828):" right", def. 10; "self-defense."

[45] "[W]hen a long train of abuses and usurpations, pursuing invariably the same Object envinces a design to reduce [the People] under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security."

[46] "If the representatives of the people betray their constituents, there is no recourse left but in the exertion of that original right of

In 1826, Chancellor James Kent, continuing a centuries old tradition, counted the individual right to self defense among the "absolute rights" of Americans[47], a sentiment later echoed by "approved commentators" Story and Cooley (3 Commentaries § 395, 1889-1890)

In Beard v. United States, 158 U.S. 550 (1895), and John Bad Elk v. U.S., 117 U.S. 529, 537-38 (1900), this Court described the right of an individual to resist violent attack or unlawful force.

In that regard, this Court has held under the Fourteenth Amendment that, although a foreigner may be rightfully denied the right to own rifles or shotguns to protect state game animals, "The prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense." Patsone v. Pennsylvania, 232 U.S. 138 @ 143 (1914).

The Law of Nations, supra, offers a long accepted analogy to the tragic modern paradox of random public murder, equating certain acts on land to piracy at sea[48]. That ancient description well describes the modern phenomenon of the suicide murderers of fundamentalist Islam. The Law of Nations endorses the idea that an individual acting with clearly lethal intent has declared war on all mankind and may be- indeed, must be- resisted with sufficient force to terminate his

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self defense which is paramount to all forms of positive government."Emphasis added.

[47] 1 Kent 46: "The right of self-defense is part of the law of our nature, and it is the indispensable duty of civil society to protect its members in the enjoyment of their rights, both of person and of property. This is the fundamental principle of the social compact." (Emph add.)

[48] "Piracy is robbery ... It is the same offence at sea with robbery on land; and all the writers on the law of nations, and on the maritime law of Europe, agree in this definition of piracy. Pirates have been regarded by all civilized nations as the enemies of the human race, and the most atrocious violators of the universal law of society. They are every where pursued and punished with death ..." 1 Kent 172-73. Emphasis added.

acts. Absent the tools of self defense, every citizen in a public murderer's proximity is rendered a victim. (ER @ 277)

The Supreme Court of Hawaii has described the common law as "a system of fundamental principles, reason, and a system of legal logic", and the Ninth Circuit has called the Ninth Amendment "a way of reading the Constitution." Throughout the course of this litigation , therefore, Petitioner has appealed to historic facts and authorities to substantiate his contention that possession of the tools of self-defense remains a reserved right of the people assertable by an individual citizen[49] and necessarily contained within the right to arms.

The collective right of self defense is demonstrated by the historic duty of the citizen to assist the local sheriff as part of the posse comitatus, and his liability to both state[50] and federal militia service.[51] (c.f. HRS 121-1)

The individual right may be seen from a variety of sources, including the fact that the police have no duty to protect an individual[52]. Absent a government duty to protect the individual, the individuals who comprise "the people" inevitably retain the fundamental natural, personal and political right of self-defense[53]. (ER @ 134)

In the present case that fact is underscored by the overlapping arms guarantees of the Hawaii and

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[49]See also: "Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment,"Johnson, 24 Rutgers L.J. 1 (1992).

[50] 12 Corpus Juris 937, sec. 445.

[51] c.f. Houston v. Moore, 1 S.Ct. 19, 22-23, 27; Dunne v. People, 94 Ill. 120, 34 Am. Rep. 213 @ 217, 222; Selected Draft Law Cases, 38 S. Ct. 159 (1918).

[52] De Shaney v. Winnebago Cty. Soc. Serv. Dept., 489 U.S. 189, 196-97 (1988); Bowers v. DeVito, 686 F2d 616 (1982); Warren v. District of Columbia, 444 A2d 1 (D.C. App., 1981).

[53] e.g. "The right to defend oneself from a deadly attack is fundamental." U.S. v. Panter, 688 F.2d 268, 271 (5th Cir. 1982).

U.S. Constitutions. (San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33 (1973): a right is "fundamental" if it is "explicitly or implicitly guaranteed by the Constitution."

In both the Hawaii and American context, the legacies of Christianity, the Law of Nations[54], the common law and the Constitution can only have one meaning: that the people have reserved to themselves the inalienable right of individual and collective self defense against criminals, tyrants, and foreign invaders[55]. No other explanation adequately reconciles citizen sovereignty[56] and the enumerated right to arms with the real-world division of power between the people and local, state and federal government. The right is meant to protect in a practical way the lives, rights and property of the people.

Private possession and use of firearms in self-defense by citizens comprises an intrinsic part of the American paradigm of individual liberty, private property, and limited government[57].

The right to keep and bear arms for "personal security and self defense"- acknowledged as a right which would attach even to freed slaves in Dred Scott v. Sanford, 60 U.S. 393 @ 417 (1857)- was virtually unquestioned until after the Civil War. (Halbrook, supra, ch. 1.2)

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[54] The Law of Nations is a recognized facet of the Common Law (4 Blackstone: Of Public Wrongs, chapter V, p. 67: Of Offenses Against The Law Of Nations: "[T]he law of nations ... is here adopted in its full extent by the common law, and is held to be a part of the law of the land." See also: 1 Kent 1-187 at 203; Story 52-58, 691; Webster's American Dictionary of the English Language, (1828): law, def. 7.

[55] C.f. "Beyond Penumbras and Emanations: Fundamental Rights, The Spirit Of The Revolution, And The Ninth Amendment," supra.

[56] "The Right To Keep And Bear Arms In Light Of Thornton: The People And Essential Attributes Of Sovereignty," ___ Brigham Young University L.R. 137 (1998).

[57] ER/Senate Report.

Despite its extensive legal history, legitimate use, and presence in a state guarantee, Petitioner's peaceful 'claim and exercise' of the right to defensively bear arms for personal security and self defense was considered per se criminal by the lower courts, despite a complete lack of abuse. (ER @ 37-45; .)

The intervention of this court is necessary in the present case to reestablish historic principles of order and consistence in the jurisprudence of Hawaii and the Ninth Circuit.

CONCLUSION:

In another Habeas Corpus case, Duncan v. Kahanamoku, 327 U.S. 304 (1946), this court ended years of illegal military usurpation in Hawaii. The present case offers this court the same opportunity to liberate Petitioner and Hawaii's citizens from unlawful abuse and usurpation, and to establish the Constitution's promise of "a Republican form of government[58]" to Petitioner and the people of that isolated and vulnerable island state.

For the above reasons, this court should grant the instant Petition, vacate Petitioner's conviction, or remand this case to the appropriate lower court for further proceedings and expansion of the record.

Respectfully submitted under penalty of perjury,

Marc Mendoza, Petitioner
P.O. Box 252 Kenwood, California 95452
707-953-1739

[58] Constitution, Article IV, Sect. 4; Constitution, Article VI, cl. 2.

APPENDIX

Orders, Opinions, Findings Of Fact And Conclusions Of Law

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No. 19988

IN THE SUPREME COURT OF THE STATE OF HAWAII

MARC CHARLES MENDOZA,
Petitioner,
vs.
THE HONORABLE BOYD MOSSMAN, Judge of the Circuit Court of the Second Circuit, State of Hawaii,
Respondent.

ORIGINAL PROCEEDING

ORDER

Upon consideration of the Petitioner for a Peremptory Writ of Prohibition filed by Petitioner Marc Charles Mendoza and the papers in support,

IT IS HEREBY ORDERED that the petition is denied without prejudice to any remedy Petitioner may have by way of appeal.

DATED: Honolulu, Hawaii, August 6, 1996.

FILED
Feb 12 1998
Clerk Supreme Court s//L. Nakagawa
CR. NO. 95-
0403(3)
Second Circuit Court

No. 20127

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII
Plaintiff-Appellee,
vs.
MARC CHARLES MENDOZA,
Defendant-Appellant.

SUMMARY DISPOSITION ORDER

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments made and the issues raised by the parties,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawaii, February 12, 1998.

On the briefs:
Marc Charles Mendoza,
Defendant-appellant pro se

Artemio C. Baxa, Deputy
Prosecuting Attorney for plaintiff-appellee

FILED in the
United States District Court
District of Hawaii
May 08 2003
at 2 o'clock and 40 min. PM
Walter A. Y. H. CHINN, CLERK

CIV. NO. 99-00699 ACK-BMK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MARC CHARLES MENDOZA
Petitioner,

vs.

ERNEST DE LIMA, in his capacity as Administrator,
Adult Client Services Branch, of the Second Circuit,
State of Hawaii,

Respondent.

ORDER ISSUING MODIFIED CERTIFICATE OF APPEALABILITY

Petitioner Marc Charles Mendoza instituted the above-entitled action for habeas corpus relief pursuant to 28 U.S.C. 2254. The habeas petition concerned Petitioner's 1996 conviction for violating Hawaii Revised Statutes ("H.R.S.") 134-6 (Place to Keep Firearms).[59] The

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[59] Count One of the Amended Complaint charged that on or about August 24, 1995, Petitioner, without being in compliance with H.R.S. 134-5 and 134-9, intentionally, knowingly, or recklessly carried on his person, or had in his possession, a loaded firearm in a place other than his place of business, residence or sojourn, thereby committing the offense of Place to Keep Firearm in violation of H.R.S. 134-6.

Petitioner was convicted of violating the above statutes for carrying a concealed firearm to the hotel where a Ninth Circuit

matter was referred to the Magistrate Barry M. Kurren, who filed his Findings and Recommendations on August 22, 2002. Magistrate Kurren recommended that the Petition be dismissed in its entirety. In the Findings and Recommendation, he found that all of Petitioner's claims, except the claims that H.R.S. 134-6 is unconstitutional and invalid, are procedurally defaulted. Magistrate Kurren based this conclusion on Petitioner's failure to fairly present his claims to the highest state court, which is a prerequisite to a federal court considering a petition for habeas corpus. In addition, Judge Kurren found that H.R.S. 134-6 does not violate the United States or Hawaii Constitutions, nor is it invalid as implemented.

Subsequently, Petitioner objected to the Magistrate's Findings and Recommendations,[60] however this Court adopted the Magistrate's Findings and Recom-

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judicial conference was being held. In Petitioner's "Notice of Objection to Prejudicial Judicial Gloss," Petitioner, for the first time before this Court, claims that he had no knowledge that a Ninth Circuit conference was being held at the hotel where he illegally possessed the firearm. He now claims that he was merely present in a hotel open to public where, by coincidence, a Ninth Circuit conference was being held.

The record, however, does not support Petitioner's new claim. Deputy U.S. Marshal Richard Hann, who provided protection for the Ninth Circuit judicial conference, testified in the state court proceedings that "the hotel staff advised the protection personnel with my agency that [Mendoza] was asking questions about participants in a conference at the hotel, specifically the chief judge of the Ninth Circuit, Judge Clifford Wallace." (Transcript of Videotaped Proceedings, Petition for Writ of Habeas Corpus, Ex. 20, at 28.) Furthermore, the front desk agent at the hotel testified that Petitioner insisted that he knew the judicial conference was being held in the hotel – "Well, you have the judges' conference here" – and asked her about the location of Judge Wallace's room (Id. at 63.)

[60] Petitioner only objected to Magistrate Kurren's findings that H.R.S. 134-6 was unconstitutional and invalid as implemented. He did not object to the finding that his other claims were procedurally defaulted. The Court noted this in its Order dated November 21, 2002.

mendations for the Writ of Habeas Corpus to be dismissed in an Order filed on November 21, 2002. In addition, Petitioner filed a Motion for Reconsideration of the Court's November 21, 2002, Order, which the Court denied on January 15, 2003.

On March 17, 2003, Petitioner Marc Charles Mendoza filed a Notice of Appeal and Application for Issuance of Certificate of Appealability with the Ninth Circuit to appeal this Court's November 21, 2002, Order Adopting Magistrate Judge's Findings and Recommendation for Writ of Habeas Corpus to be Dismissed and this Court's January 15, 2003, Order Denying Petitioner's Motion for Reconsideration.[61]

The Court initially granted Petitioner's Certificate of Appealability on March 18, 2003. The Ninth Circuit, however, remanded this case for the limited purpose of issuing a modified certificate of appealability specifying which issues meet the required showing under 28 U.S.C. 2253 (c) (3).

To obtain a certificate of appealability, a petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253 (c) (2). Petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983).

In its November 21, 2002, Order, the Court found that Petitioner's arguments in his 2254 motion were without merit. Although the Court found that a denial of Petitioner's 2254 motion was warranted, it is possible that another court may resolve the issue differently. The court finds that two issues addressed in the Court's Order adopting the Magistrate's Findings and Recommendations for the Writ of Habeas Corpus to be Dis-

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[61] On February 11, 2003, the Court granted Petitioner's request for a thirty-day extension of time to file an appeal, extending Petitioner's deadline to March 17, 2003.

missed meet the required showing under 28 U.S.C. 2253 (c) (3) : (1) that Hawaii Revised Statute 134-6 is unconstitutional under the Hawaii and United States Constitutions, and (2) Hawaii Revised Statutes Chapter 134 is invalid because implementing rules and regulations were not adopted in accord with the procedures required by the statute and the Hawaii Administrative Procedures Act. Accordingly, the Court GRANTS the certificate of appealability as to these issues.

IT IS SO ORDERED.
DATED: Honolulu, Hawaii, MAY 8 2003
United States District Judge – s/ Alan C. Kay

. FILED
. APR 15 2004
. Cathy A. Catterson
. Clerk, U.S. Court of Appeals

No. 03-15492
D.C. No.
CV-99-00699-ACK/BMK
MEMORANDUM*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARC CHARLES MENDOZA
Petitioner – Appellant,

v.

ERNEST DE LIMA, Administrator, in his capacity as Administrator, Adult Client Services Branch of the Second Circuit, State of Hawaii,

Respondent – Appellee.

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Submitted April 12, 2004**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: O'SCANNLAIN, RYMER and BEA, Circuit Judges.

Former Hawaii state prisoner Marc Charles Mendoza appeals pro se the district court's judgment dismissing his 28 U.S.C 2254 habeas petition challenging his conviction by jury trial for possessing a loaded firearm in a place other than his place of business or residence. We have jurisdiction pursuant to 28 U.S.C. 2253, and we affirm.

Mendoza contends that Hawaii Revised Statute 134-6 violates the Second, Fourth, Fifth, Ninth, Tenth, Thirteenth and Fourteenth Amendments to the United States Constitution. We disagree. The Second Amendment limits only federal action. *See* Fresno Rifle and Pistol Club v. Van De Kamp, 965 F .2d 723, 729-31 (9th Cir. 1992). The Ninth Amendment does not encompass an unenumerated individual right to bear arms. *See* San Diego County Gun Rights Comm. V. Reno, 98 F .3d 1121, 1125 (9th Cir. 1996). In addition, Mendoza presented no viable arguments that would establish that Section 134-6 is not rationally related to a legitimate government interest under the Equal Protection Clause of the Fourteenth Amendment. *See* United States v. Hancock, 231 F .3d 557, 565-66 (9th Cir. 2000). Finally, there is simply no basis in the law for Mendoza's claims to an individual right to carry a firearm under the Fourth, Fifth, Tenth and Thirteenth Amendments.

We may not consider Mendoza's claims under the Hawaii Constitution because they do not allege a "violation of the Constitution or laws or treaties of the United States." *See* 28 U.S.C. 2254.

Mendoza also contends that Hawaii Revised Statutes Chapter 134 is invalid under the Due Process Clause of the Fourteenth Amendment because the state did not adopt implementing rules and regulations in accord with the procedures required by statute and the Hawaii Administrative Procedures Act. Because Mendoza does not allege that he applied for or would have

qualified for a license to carry a firearm under any interpretation of the statute, he lacks standing to bring this claim. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62 (1992).

Mendoza's motion for broader certification is denied. *See* Valerio v. Crawford, 306 F .3d 742, 767 (9th Cir. 2002).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 03-15492
CT/AG#: CV-99-00699-ACK/BMK

MARC CHARLES MENDOZA
Petitioner – Appellant

v.

ERNEST DE LIMA, Administrator, in his capacity as Administrator, Adult Client Services Branch, of the Second Circuit, State of Hawaii
Respondent – Appellee

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered April 15, 2004

FILED
JUL 13 2004
Cathy A. Catterson
Clerk, U.S. Court of Appeals

No. 03-15492
DC No.
CV-99-00699-ACK/BMK
District of Hawaii

ORDER

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARC CHARLES MENDOZA
Petitioner – Appellant,
v.

ERNEST DE LIMA, Administrator, in his capacity as Administrator, Adult Client Services Branch of the Second Circuit, State of Hawaii,

Respondent – Appellee.

Before: O'SCANNLAIN, RYMER and BEA, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed appeal.

Marc Charles Mendoza
1830 Adobe Canyon Road
Kenwood, California 95452
(707) 953-1739
In Propria Persona

FILED IN THE UNITED STATES DISTRICT COURT, DISTRICT OF HAWAII
MAR 17, 2003 12:03 pm
Walter Y.H.Chinn, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF HAWAII

Marc ... Mendoza, Petitioner	CIVIL NO.99-00699ACK-BMK
	NOTICE OF OBJECTION TO PREJUDICIAL JUDICIAL GLOSS; AFFIDAVIT IN SUPPORT; EXHIBITS A AND B; CERTIFICATE OF SERV ICE
vs.	
CHERYL MARLOW, In her capacity as Supervisor, Adult Probation Division Circuit Court, State of Hawaii,Respondent	

NOTICE OF OBJECTION TO PREJUDICIAL JUDICIAL GLOSS

PETITIONER Marc Mendoza hereby enters his STRENUOUS OBJECTION to the prejudicial gloss added by this court in its Order Denying Petitioner's Motion for Reconsideration of January 15, 2003 (hereinafter, Order).

On page p. 18, paragraph 2 of that Order, the court gave the unfounded, inflammatory and prejudicial implication that Petitioner had knowingly "carried a concealed firearm to the hotel where the Ninth Circuit conference was being held."

The court fails to note that the judicial conference-held in a hotel open to the public- was a secret undisclosed to the public.

To imply that Petitioner knowingly entered a judicial conference bearing arms is unfounded, inflammatory, and prejudicial to the just resolution of Petitioner's attempt to regain his abrogated rights and citizenship.

The prohibition regarding bearing arms in courts of law and the like is among the most ancient of arms regulations (Rex v. Knight, 87 Eng. Rep. 75, 90 Eng. Rep. 330 (1687), construing the Statute of Northampton, 2 Edw. 3), both of which were referenced by Petitioner at state trial.

Petitioner's testimony in the trial court indicated his familiarity with the legal and historical background of the right to bear arms[62]; Petitioner has never in the course of this litigation ever proffered the specious contention that he or any other citizen is free to bear arms in a courthouse, judicial conference or the like.

It is impossible for Petitioner to fight tacit assumptions unsupported by the record or dignified by a formal charge.

If this court believes Petitioner evidenced any intent to harm another while conducting business at the [Intercontinental] Resort on August 24, 1995, or that Petitioner had prior knowledge of the SECRET, UNDISCLOSED judicial conference taking place there, Petitioner specifically asks for criminal charges to be brought before a federal grand jury, or that such facts be forwarded to the United States Attorney for a criminal investigation.

In the alternative, Petitioner respectfully demands that any reference to the judicial conference taking place on the day of Petitioner's arrest include the FACT that Petitioner and the Citizens of Maui were not

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informed of a de facto federal takeover of that otherwise public place.

DATED THIS 13th DAY OF MARCH, 2003, KENWOOD, CALIFORNIA:

s/Marc Charles Mendoza
In Propria Persona

[1] See: Transcript (June 18, 1996), pp. 17-34, submitted as Appendix F, Exhibit 21 of Petitioner's original Petition.

POLICE DEPARTMENT
County of Maui
Wailuku, Hawaii 96793
808-244-6400
808-244-6411 (fax)

Our Reference
CS:yyc

October 18, 1995

Mr. Marc C. Mendoza
P.O. Box 11471
Lahaina, Hawaii 96761

Dear Mr. Mendoza:

...

Regarding 134-9; License to Carry, we do not have written procedures to address this section. Presently, any individual requesting a Permit to Carry is referred to the Office of the Chief. For your information, no permits have been issued to private citizens in the past fifteen years.

In response to 134-14; Report, we do not prepare a monthly report concerning revoked permits for the Attorney General's Office.

...

Very truly yours, s/Howard H. Tagomori
Chief of Police

STATE OF HAWAII
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813
808-586-1500

September 13, 1995

Mr. Marc M. Mendoza
Box 11471
Lahaina, Hawaii 96761

Dear Mr. Mendoza,

...

Responding to your inquiry as correctly rephrased, the Department of the Attorney General has not, to my knowledge, at any time "prescribed" a permit to acquire, mental health waiver, or registration form pursuant to Haw. Rev. Stat. 134-2 and 134-3. The Department of the Attorney General has not, to my knowledge, prescribed the form for making reports pursuant to Haw. Rev. Stat. 134-14 nor has it "received" [sic] any such reports during the years 1992-1995.

...

Very truly yours, s/Edwin L. (Ted) Baker
Supervising Deputy Attorney General
Criminal Justice Division

ELB:elb
C: Stella Lee, Esq., Office of Information Practices
Maui Police Department, Firearms Section
(w/enclosures)